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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 390

OZARK BUTANE COMPANY, INC.,
a Corporation of the State of Arkansas, *Appellant*

V.

OKLAHOMA LIQUEFIED PETROLEUM GAS BOARD
and W. D. RUSH,
Liquefied Petroleum Gas Administrator, *Respondents*

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 3 of the Revised Rules of this Court, the appellant moves that the Motion to Affirm filed by respondents be overruled on the ground that the appeal presents important constitutional questions. The precise points in issue have not been settled by this court, but, based upon fundamental principals heretofore enuniciated in the decisions of this court, it is believed that the application of 52 O.S. 420.14 to Ozark Butane Company, Inc., under the facts set forth in the record of the case, is clearly in violation of the Constitution and Statutes of the United States.

STATEMENT OF THE CASE

The statement of appellant's case is set forth at pages 1 through 9 of the Jurisdictional Statement and is re-asserted herein by reference. Each and every allegation by respondents in conflict therewith is denied unless specifically hereinafter admitted.

Regarding the last sentence of respondents' statment of their case, the record will show that orders are received from Oklahoma, Missouri and Arkansas customers rather than from Oklahoma customers only, and that in filling such orders from Oklahoma storage that some deliveries are made from a single truck load to the various destinations within and without Oklahoma.

ARGUMENT

The argument of appellant is set forth in the Jurisdictional Statement, under the heading "The Questions are Substantial," beginning at page 9, and is re-asserted herein by reference. Each and every allegation of respondents in conflict therewith is denied unless specifically hereinafter admitted.

The first paragraph of respondents' argument contains an important omission of fact and of issue. The second sentence asserts that the registration permit required by 52 O.S. 420.14 "has absolutely no application to appellant's acquiring gas in Oklahoma and transporting same into interstate commerce to its' storage in Oklahoma." But it fails to say that the transportation of one-third of such gas by appellant back across the state line into the Oklahoma storage of appellant or direct to commercial plants at Jay, Stillwell and Proctor, Oklahoma is likewise transportation in interstate commerce and is clearly prohibited by the language of 52 O.S. 1961 420.4, to-wit:

"Nor shall any transporter, distributor or retailer of L.P.G. store, dispense and/or transport over the highways of this state any L.P.G. intended for use in this state."

When this omission is supplied 52 O.S. 420.14 clearly places an enbargo upon interstate commerce at this point in the conduct of appellant's business without further consideration as to the subsequent movement of the gas by appellant.

Mere assertion of the attorney for respondents in the lower court that 52 O.S. 420.14 was not aimed by the state legislature at bringing the gas back into Oklahoma does not save the statute from being unconstitutional. The full text of paragraph A of 52 O.S. 420.4 is set forth as follows:

"No person, firm, or corporation shall hereafter engage in this State in the business of manufacturing, fabricating, assembling, or installing any systems, containers, apparatuses, or appliances used or to be used in this State in or for the transportation, storage, dispensing, or utilization of L.P.G., nor shall any transporter, distributor or retailer of L.P.G. store, dispense, and/or transport over the highways of this State any L.P.G. intended for use in this State in any such system, container, apparatus or appliance, without having first applied for and obtained a registration permit to do so; provided, that, except as otherwise provided in sub-paragraph (c)(3) hereof, no such permit shall be required by an individual engaged in any of said businesses solely as an employee of a duly qualified registrant, or by any person, firm or corporation engaged in the production or manufacture of L.P.G., and/or selling or reselling L.P.G. to transporters, industrial consumers, processors, distributors and/or retailers, or by any person, firm or corporation selling or delivering motor vehicles or tractors which are factory equipped with an L.P.G.-Gas system, container, apparatus or appliance for the utilization therein of L.P.G. as motor fuel. Applications for registration permits shall be in writing, on a form provided

by the Board, and shall contain such pertinent information as the Board shall require. Upon approval of each such application as hereinafter provided in subsection (d) and receipt of the certificates of insurance required under subsections (f) and (g) hereof, unless waived as hereinafter provided, the administrator shall issue to the applicant a nontransferable permit to engage in the phase of the liquefied petroleum gas industry in this State to which such permit applies until the same shall expire, or shall be suspended or revoked, as hereinafter provided."

Topic I of respondents' argument (page 5) asserts that the interstate feature of appellant's business ended when the L.P.G. gas was placed in its storage tanks in Oklahoma (this admits that the second leg of the journey for the gas is interstate commerce but omits any reference thereto of any applicability or non-applicability thereto of 52 O.S. 420.14) and then postulates as did the lower court that the only business activity of appellant affected by said statute was the movement of the gas from appellant's storage in Oklahoma to its customers in Oklahoma and that such activity is wholly intrastate commerce. No mention is made of the fact, as previously pointed out, that some of the gas stored in Arkansas moves directly to commercial plants in Oklahoma and that some of the gas moved from Oklahoma storage goes to Arkansas and Missouri customers.

This abrupt division between interstate commerce, into appellant's storage in Oklahoma and intrastate commerce out of such storage is based by respondents upon the law established by *Minnesota* v. *Blasuis,* 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34 as cited in their brief at page 5. Said case does not support the division between interstate and intrastate commerce respondents are attempting to make in case at bar as the question of situs for the purpose of taxation

is not involved. Here the issue is whether appellant as a foreign corporation which has shipped L.P.G. in interstate commerce to storage in Oklahoma for further shipment and sale can be prohibited by the state from making such further shipment and sale to customers along established routes in and through Oklahoma, into Missouri and back into Arkansas. That such L.P.G. is in the flow of commerce between states cannot be questioned and though such commerce might be considered as suspended for the purpose of reasonable taxation on the theory of situs, it cannot under the *Minnesota* v. *Blasuis* case (or the Bacon case cited therein) be considered as ended so that the state can prohibit further shipment and sale by appellant as aforesaid.

The *Independant Warehouse* case, 331 U.S. 70, 91 L.Ed. 1346, 67 S.Ct. 1062 cited by respondents along with the above case cites the *Minnesota* case as its controlling authority and considers the issue of interstate commerce for the purpose of local nondiscriminatory taxation only and for the same reason is likewise distinguished from the case at bar.

Appellant has cited *United States* v. *Swift & Co.*, 122 Fed. 529 (1903) as controlling the definition of interstate commerce under the facts of the present case, for here we have a combination of independent Oklahoma L.P.G. dealers acting through their state legislature in an attempt to prevent appellant from shipping L.P.G. in a constantly recurring course of business activity reaching from Oklahoma to Arkansas, back into Oklahoma, into Missouri and back into Arkansas. This current of interstate commerce has been in existance for 17 years. Respondents did not attempt to distinguish this case in their Motion to Affirm. The shipment out of appellant's storage in Oklahoma is certainly a part of the current of interstate commerce within such definition.

The respondents have further cited *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., et al.*, 340 U.S. 179, 95 L.Ed. 190, 71 S.Ct. 215, in support of their position. Appellant's have not questioned the authority of a state to reasonably regulate interstate business where the Federal Government has not yet acted but assert that the regulations imposed by the state either prohibit interstate commerce altogether or by their necessary operation and effect amount to an unreasonable burden upon interstate commerce.

The respondents have attempted to distinguish *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 54 L.Ed. 355, 30 S.Ct. 190, cited by appellant at page 10 of its Jurisdictional Statement. Appellant asserts that the effect of this case is much broader than is indicated by respondents. In it the court recognizes many principals previously decided which control issues in this case. One of these principals is cited by appellant at page 10 above mentioned. This case also holds that a state may not as a condition of doing purely local business require a foreign corporation to surrender rights belonging to it under the Constitution of the United States. One of such rights being the privilege of a foreign corporation to carry on interstate commerce.

Respondents also attempt to distinguish *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 79 L.Ed. 1032, 55 S.Ct. 497 cited by appellant at page 10 of its Jurisdictional Statement. Regarding respondents' comments thereon, it is noted that the New York Statute involved does completely prohibit the sale of Vermont milk unless the price paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York.

The case at bar prohibits transportation, storage and dispensing. The New York case prohibits sale. These cases

are analogus in that both involve an attempt by the state to save local businesses from competition from legitimate interstate commerce.

Respondents attempt to distinguish *Hood* v. *Drummond*, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657 cited by appellants at page 10 of its Jurisdictional Statement. Like the case at bar, this is another instance where a statute was designed to protect local interests by eliminating competition from interstate commerce. The *Hood* case holds very clearly that neither the Power to Tax or the Police Power of the State may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with products of another state and that restrictions so contrived are an unreasonable burden on interstate commerce. Appellant submits that it is wholly immaterial whether such restriction is imposed on goods going out of the state. going through the state or entering the state. The effect is the same.

Regarding topic II of respondents' argument on equal protection (page 7), appellant asserts that at the time 52 O.S. 420.14 was passed appellant was within the jurisdiction of the state and in full compliance with the laws for admission to the state, that it had acquired large amounts of property by authority of and in compliance with the laws of Oklahoma, that it was subject to the jurisdiction of the courts of Oklahoma, that it has paid taxes on its property, and under the state law had the same right to renew its license as did other foreign corporations engaged in the L.P.G. business in Oklahoma. That upon passage of 52 O.S. 420.14 appellant and others having laws dissimilar to the L.P.G. laws of Oklahoma were deprived of the right to a renewal license, whereas other foreign corporations chancing to come from states having no L.P.G. laws or L.P.G. laws similar to Oklahoma retained their right to a renewal license.

That appellant was a person within the state of Oklahoma and entitled to equal protection of the law at the time 52 O.S. 420.14 was passed is unquestioned. That said statute unequally deprived appellant of the right to obtain a renewal license cannot be questioned. This is the hand of discrimination the *Southern Railway* v. *Greene,* 216 U.S. 400, 54 L.Ed. 536, 30 S.Ct. 287, case cited by appellants speaks of when it states that the equal protection clause was designed to prevent a single class of persons from being singled out as a special subject for discriminatory and hostile legislation.

The *Hanover Fire Insurance* v. *Carr* case, 272 U.S. 494, 71 L.Ed. 372, 47 S.Ct. 179, cited by appellant states that any attempt of a state to vary the terms of the original license, as a condition for renewal, which involves a deprivation of Federal Constitutional rights cannot be effective; that after admission the foreign corporation stands equal with corporations similarly situated and is entitled to equal protection of the law.

In the *Hanover* case, the state tried to support its unequal tax on the grounds that it was a condition for the continuance of business activities in the state. The state reasoned that since it could impose unequal conditions for admission that it could impose like conditions for renewal. The court said this is not so, once a foreign corporation is admitted to the state and is in full compliance with the laws of admission such corporation is a person within the state and entitled to equal protection. The license of the insurance company in this case had to be renewed each year.

Respondents cite the *Lincoln National Insurance Co.* v. *Read* case, 325 U.S. 673, 89 L.Ed. 1861, 65 S.Ct. 1220, as distinguishing the *Hanover* case from the case at bar.

The *Lincoln* case is different from both the case at bar and the *Hanover* case and has no application to either. In the *Lincoln* case the state admitted the corporation on the express condition that it agreed to pay for renewal such tax as Oklahoma might later impose. Failure to pay the tax was failure to comply with the original condition for admission to the state. In the case at bar and in the *Hanover* case there was full compliance with the original conditions for admission to the state. The issue in these cases is the right of a state to impose unequal conditions for the *renewal* of a license, not for the granting of a license.

Respondents rely entirely upon *Fire Association of Pennslyvania* v. *New York*, 119 U.S. 110, 30 L.Ed. 342, 7 S.Ct. 108, in its argument on equal protection. This case was decided in 1886. The case turns upon the rationale that corporations are not persons within the meaning of the equal protection clause of the 14th Amendment of the United States Constitution. It considered the line of cases which had already decided that corporations are entitled to the protection of the Interstate Commerce clause, but reasons that since insurance is not interstate commerce that this precedent does not apply. Insurance has subsequently been considered to be interstate commerce.

It is submitted that the dissent of Justice Harlon J in the above case, holding that corporations are persons within the state upon their admission to a state and are entitled to equal protection, has now become the law under the *Hanover* case as distinguished on fact but not on law in the 1945 *Lincoln* case.

Regarding topic III of respondents' argument (page 10), appellant submits that the court must look through the form of 52 O.S. 420.14 to its necessary operational effect.

Appellant, a foreign corporation with its principal place of business in Arkansas, cannot obtain a permit unless it moves its principal place of business from Arkansas to Oklahoma. When it does this it loses its diversity of citizenship for the purpose of Federal Jurisdiction and is subject solely to the jurisdiction of the state court unless a federal question is involved. Appellant asserts that this condition requires the surrender of the right of foreign corporations to pursue causes in the Federal Courts as completely as if the statute expressly provided for the revocation of a foreign corporation's license should the corporation remove an action to the Federal Courts which involved a nonresident and a citizen of the state. 52 O.S. 420.14 should, therefore, be declared unconstitutional as requiring the surrender of the right of a foreign corporation to pursue causes in the Federal Courts.

CONCLUSION

For the reasons above stated the questions presented are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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